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## EASTPHALIA AS THE PERFECTION OF WESTPHALIA

*Tom Ginsburg*<sup>\*</sup>

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### INTRODUCTION

For at least three decades, it has been quite common in the United States to talk of the coming of the Asian Century. Since the publication in 1979 of Ezra Vogel's *Japan as Number One*,<sup>1</sup> Americans have been fascinated with the rise of Japan and then China, and the corresponding reports of the decline of the United States. This psychology may have intensified with the 2008-09 financial crisis and the understanding that China is now playing a central role in assuring global financial, and thereby political, stability. Notwithstanding some Orientalist hyperbole, there is no doubt that Asia has been, and will continue to be, a region of rising power, responsible for an increasing share of world output, innovation, and power, even as the United States declines in relative terms.

What will the rise of Asia, mean for global governance? Oddly, I believe that any "Eastphalian" world order will mean a return to Westphalia, at least as modern international lawyers understand the term. Drawing its name from the 1648 treaties ending the Thirty Years' War and the Eighty Years' War, Westphalia stands for principles of mutual noninterference, an emphasis on sovereignty, and formal equality of states. Eastphalia, should it materialize, will

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<sup>1</sup> EZRA VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA (1979).

emphasize similar structures, putting an end to the brief interlude of European universalism and global constitutionalism that intensified after the Second World War.<sup>2</sup>

Universalism has driven the great development of the human rights movement and the establishment of an infrastructure of global institutions. Global constitutionalism has inspired increasingly numerous attempts to reach into policy realms previously considered within the domestic jurisdiction of a state and, in the European case, a shift to supermajority rather than unanimity as a basis of intergovernmental decision-making. But Asian countries have not been leaders in either of these movements. Instead, they have reacted cautiously and have emphasized the traditional concerns of sovereignty and noninterference. There is little sign that this approach will change radically, even as economic and political power continues to shift to the proverbial East.

It is often argued that the European Union is somehow the future of global governance.<sup>3</sup> As Slaughter and Burke-White put it, “The Treaty of Westphalia . . . has given way to the Treaty of Rome.”<sup>4</sup> European nations embody the Kantian “democratic peace,” having replaced the battlefield with a marketplace. Europe, we are told, has given up the retrograde nation-state ideology in favor of a technocratic superstate of ever-widening scope. The strong implication is that where Europe goes, the world will follow, once sufficiently enlightened. This claim seems incompatible with Asian economic trajectories and the recent history of internationalism in the Asian region. Only if Asia’s political preferences and infant regional institutions magically transformed into mirrors of Europe would we expect an Asia-centered economic order to

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<sup>2</sup> Apparently there was a historical “Eastphalia” (German: Ostfalen) corresponding to Westphalia or Westfalen. Ostfalen, <http://de.wikipedia.org/wiki/Ostfalen> (last visited August 31, 2009). Thanks to Shinichi Ago for pointing this out.

<sup>3</sup> See, e.g., MARK LEONARD, WHY EUROPE WILL RUN THE 21ST CENTURY 3-4 (2005); Anne Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 HARV. INT’L L. J. 327, 329 (2006).

<sup>4</sup> Slaughter & Burke-White, *supra* note 3, at 331.

converge with the European model of politics and law. This outcome seems highly unlikely, as this essay will argue.

At the same time, an Eastphalian revival of supposedly outdated notions of sovereignty has the potential to further the never-realized promise of Westphalia—a reduction in international conflict. As has long been recognized, the liberal international order has interventionist tendencies that may, in fact, be conflict generating. This tendency is particularly true under the universalistic vision associated with the United States. Asian respect for sovereignty may, thus, lead to a reduction in international conflict, even though it bodes poorly for international critiques of human rights practices in authoritarian states.

To be sure, there is no guarantee that an Eastphalian order will emerge. In the latter part of this essay, I consider the probability of an Eastphalian order arising, and find it unlikely. Even if Asia dominates the world economically, the presence of other powers, and the non-universalist tradition of Asian international relations, means that Asian preferences with respect to the structures of international interaction will not necessarily dominate. It is also possible that Asian preferences, as exhibited in the behavior of states, may converge with those of European internationalists. In my view, however, the most likely scenario for international law and order in the twenty-first century is neither a complete “Eastphalian” return to Westphalia nor a universalistic, transgovernmental dialogue of the type championed by Professor Slaughter. Instead, the likely outcome is a complex struggle in which universalism coexists with a continuing emphasis on sovereignty, with Asian nations weighing on the latter side for the most part.

## I. THE EULOGIES FOR WESTPHALIA AND THE RISE OF ASIA

### A. *The Rise and Fall of Westphalia*

The conventional story of modern international law begins with the Peace of Westphalia, in which warring European princes collectively created international order out of the primordial deep. In a large-scale diplomatic conference, these princes ended the Thirty Years' War in the Holy Roman Empire and the Eighty Years' War between Spain and the Netherlands. The series of treaties they concluded provided a framework in which states could agree to disagree, thereby resolving seemingly interminable conflicts over religion that had divided Europe since the Protestant Reformation. Westphalia is usually seen as standing for the principle of sovereignty, in which each prince could choose the religion of his jurisdiction, guaranteeing minority Christian sects the right to practice their own faith.<sup>5</sup>

Westphalia's sovereignty principle has several components. First, states are formally equal. Each sovereign is the highest authority in its own jurisdiction, unable to judge other sovereigns, and, thus, is obligated to deal with other sovereigns as equals. Second, sovereignty is internally and externally directed. Each state is free to choose its own mode of governance, and that choice is entitled to respect and noninterference from other states. Third, states are the primary actors in the international system, and it is on their consent that international order rests. These principles formed the basis of the international political, economic, and legal system for the subsequent three centuries.

It must be made clear at the outset that Westphalia hardly ushered in the era of global peace that its architects imagined. Europe continued to engage in wars of great brutality and

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<sup>5</sup> Note that the guarantee of minority religious practice itself made domestic affairs the subject of international concern, in contrast with the image of Westphalia as maximizing sovereignty. That the actual system of Westphalia undercut what it is seen to stand for is beside the point. We are interested in the understanding of Westphalia and the idea of sovereignty as an organizing principle for international affairs. *See generally* STEVEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

scope. Even when not at war at home, European nations engaged in a race of conquest that transformed the globe and displaced alternative systems of international relations that were as conceptually developed as that of Europe.<sup>6</sup> Eventually, decolonization led to the export of the model of the territorial nation-state, but this development generated a new series of conflicts between, and especially within, new states as various groups sought to consolidate authority. It is not too much to say that Westphalia stood for peace in theory and war in practice. Perhaps, for this reason, Westphalian ideas began to erode in the twentieth century.

It is a commonplace that Westphalian sovereignty has been diminished by the postwar system of the United Nations and its associated human rights instruments that purport to make domestic treatment of citizens a matter of international concern.<sup>7</sup> For the first time, the international system as a whole identified human rights as a central goal of global institutions.<sup>8</sup> Led by the United States, liberal internationalism involved opening up states to outside scrutiny. But, the U.N. Charter itself reflected a split. While the Charter emphasized human rights, article 2(7) contained a Westphalian caveat: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter...”<sup>9</sup> While the protection of human rights was a normative goal of the system, the actual operating system of international law continued to emphasize state consent, noninterference, and sovereign equality.<sup>10</sup>

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<sup>6</sup> R.P. ANAND, DEVELOPMENT OF MODERN INTERNATIONAL LAW AND INDIA (2005).

<sup>7</sup> See generally JOSEPH CAMILLERI & JIM FALK, THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD (1992).

<sup>8</sup> See generally LOUIS HENKIN, THE AGE OF RIGHTS (1994).

<sup>9</sup> U.N. Charter art. 2, para. 7.

<sup>10</sup> Henkin, *supra* note 8, at 25-26; see also CHARLOTTE KU & PAUL DIEHL, THE DYNAMICS OF INTERNATIONAL LAW (forthcoming Feb. 2010).

Since the end of the Cold War, reports of the death of Westphalia have increased in frequency and intensity. It has often been asserted that the erosion of Westphalian sovereignty is increasing with the phenomenon known as globalization. Virtually every writer on globalized governance claims that it spells the death, or at least the weakening, of Westphalia.<sup>11</sup> International institutions, such as the International Criminal Court (ICC), the human rights treaty bodies, and the World Trade Organization (WTO) have infringed on policy areas previously considered national prerogatives. Regional organizations, of which the European Union (EU) is the paradigm, have transformed nominally sovereign nations into members of regional blocs, and the WTO is asserted to constitutionalize economic globalization at the multilateral level.<sup>12</sup> Non-governmental organizations and corporations, as well as individuals, have gained personality on the international plane. All this, it is claimed, calls for new thinking and the discarding of sovereignty as an outmoded concept.

What might the international order of the future look like? Anne-Marie Slaughter argues that we are already in a New World Order in which the key decisions are not taken by states pursuing their national interest but by networks of state bureaucrats and judges interacting with each other across borders to make and enforce rules.<sup>13</sup> Intensified cross-border activity creates greater demand for governmental coordination across borders. Slaughter's view is that Europe, with its cross-border integration and networks of technocratic committees, is a model for the rest of the world, as well as a harbinger. Others see the new possibility of global democracy, with

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<sup>11</sup> See ANDREW LINKLATER, *THE TRANSFORMATION OF POLITICAL COMMUNITY: ETHICAL FOUNDATIONS OF THE POST-WESTPHALIAN ERA* (1998); BEYOND WESTPHALIA?: NATIONAL SOVEREIGNTY AND INTERNATIONAL INTERVENTION (Gene M. Lyons & Michael Mastanduno eds.) (1995); Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251 (2001); Gilles Paquet, *The New Governance, Subsidiary, and the Strategic State*, in GOVERNANCE IN THE 21<sup>ST</sup> CENTURY 183 (2001); Kimon Valaskakis, *Long-term Trends in Global Governance: From "Westphalia" to "Seattle"*, in GOVERNANCE IN THE 21<sup>ST</sup> CENTURY 45 (2001).

<sup>12</sup> DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE* 236 (2008).

<sup>13</sup> ANNE-MARIE SLAUGHTER, *THE NEW WORLD ORDER* 16 (2004).

constitutionalist overtones.<sup>14</sup> In this view, global governance projects will increasingly tend toward limitation on state prerogatives and protection of the individual, much as domestic constitutional orders provide for a limited government and fulfillment of individual rights.

### *B. The Asia Problem*

It is hard to say exactly how these images of global technocracy or democracy interact with another widely accepted assumption: Asia is going to be the center of the next phase of world order. When examined in detail, sovereignty-eroding international institutions enjoy much less consensus than many otherwise think. The record of South, Southeast, and Northeast Asia in international law has been one of caution and even resistance to the notion of global constitutionalism, even as Asian powers have provided leadership in certain areas of substantive international law. In forum upon forum, the Asian powers call for restraint, sovereignty, and noninterference. One also sees in Asia limits to regionalism and institutionalization, and less acceptance of an active role for non-state actors.<sup>15</sup> Asia, thus, stands as a conservatizing player in the international scene.

Take some of the prominent institutions of global governance. The paradigm case is the ICC, whose 110 states parties include relatively few from Asia.<sup>16</sup> As of July 21, 2009, using the categorization of the U.N. General Assembly Regional Groupings, there were thirty states parties from Africa, twenty-five from Western Europe, twenty-three from Latin America, sixteen from Eastern Europe, and fourteen from Asia, making Asia the least “cooperative” region. And neither of the big emerging Asian powers, China and India, is an ICC member. By contrast, Asia is the single largest group in the General Assembly with fifty-three states. Only twenty-six percent of

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<sup>14</sup> See, e.g., COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER (Danielle Archibugi & David Held eds., 1995).

<sup>15</sup> Miles Kahler, *Legalization as Strategy: The Asia-Pacific Case*, 54 INT'L ORG. 549, 549-50 (2000).

<sup>16</sup> For the current list of states parties to the ICC, see ICC – The State Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Sept. 26, 2009).



Asian states are ICC parties, as compared to ninety-two percent of Western European and seventy percent of Latin American countries. The recent ICC arrest warrant issued for Sudan's President Omar Al-Bashir was greeted by a negative reaction from China, the Middle East, and the African Union nations, suggesting that the consensus on the warrant may be thinner than one would otherwise think. No Asian state defended the ICC prosecutor's position.

It is true that Asian states have been as willing as any to sign on to the global human rights instruments, but those are relatively undemanding of their signatories. Asia remains the only major region of the world without a regional human rights court, though the Association of Southeast Asian Nations (ASEAN) states have just inaugurated a relatively toothless Intergovernmental Commission on Human Rights. Although individual countries have begun to create national human rights commissions, discourse in the region retains a strong sovereigntist tone.

These observations are not a claim that Asian countries and Asians have made no contributions to international law. That claim would surely be wrong. In trade, Asian countries have been major players, increasingly utilizing the WTO dispute resolution system. Individual Asian jurists have led the ICC, the International Court of Justice, and the Appellate Body of the WTO. Asian countries have pushed for a number of important international law doctrines, in areas such as the Law of the Sea and principles of self-determination. But these innovations have not been sovereignty eroding. In some sense, they stand for the classical Westphalian ideals of a realm of consent-based law to regulate interactions among states.

In domestic governance, Asian countries are hardly in the lead with regard to making blanket constitutional commitments to international treaties or the operation of customary international law. Japanese courts, for example, will apply rules of customary international law

directly, but only if they are sufficiently clear.<sup>17</sup> In this sense, they have been no more international than the dreaded United States Supreme Court, often portrayed as a bastion of parochialism.<sup>18</sup> Chinese scholars have asserted that customary international law does not apply in China's domestic legal order.<sup>19</sup> Domestic application of treaties has hardly been robust in either China or Japan.<sup>20</sup>

The greatest conceptual innovation of Asian states in international law in the past several decades has been a regressive one, namely the idea that "Asian values" offered an alternative to liberal universalism.<sup>21</sup> In reaction to criticism from human rights advocates, Asian states launched a countervailing discourse, most notably in the Bangkok Declaration of 1993. Asians, we were told, value order over freedom, the group over the individual, and economic development over political liberties.<sup>22</sup> It is difficult to evaluate the veracity of these claims, made as they typically were by representatives of illiberal governments, who evoked Orientalist imagery of complacent populations comfortable with hierarchy. Certainly there is room to acknowledge competing traditions of thinking about rights and their analogues in Asia.<sup>23</sup> Whether one believes that the governments advancing Asian values are acting in good faith as representatives of their populations, it is clear that a corollary of the approach is to emphasize transnational dialogues and negotiations on rights, with implementation and enforcement left

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<sup>17</sup> See YUJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS AND JAPANESE LAW* 78 (1998) (citing the *Siberia Internment case*, Judgment of Mar. 5, 1993, Tokyo High Ct., 811 HANREI TAIMUZU 76 (1994)); see also Thomas Franck & Arun Thiruvengadam, *International Law and Constitution-Making*, 2 CHINESE J. INT'L L. 467, 495 (2003).

<sup>18</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725-28 (2004); on American judicial provincialism, see Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4 (1995).

<sup>19</sup> Franck & Thiruvengadam, *supra* note 17, at 500.

<sup>20</sup> See IWASAWA, *supra* note 17, at 37-44; Hanqin Xue & Qian Jin, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299, 302-05 (2009).

<sup>21</sup> See DANIEL BELL, *BEYOND LIBERAL DEMOCRACY* 52-83 (2006); THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 27-102 (Joanne Bauer & Daniel Bell eds., 1999).

<sup>22</sup> KISHORE MAHBUBANI, *CAN ASIANS THINK?* 47-101 (3rd ed. 2004).

<sup>23</sup> For an excellent consideration of this issue, see Elizabeth J. Perry, *Chinese Conceptions of Rights: From Mencius to Mao—and Now*, 6 PERSP. ON POL. 37 (2008).

strictly to the domestic level.<sup>24</sup> The debate provides clues as to what an international order dominated or heavily influenced by Asian governments would look like: oriented toward economic growth and development, socially conservative, and politically tolerant of domestic repression of the individual in the name of the public good.

Beyond this, Asian nations have resisted external attempts to internationalize treatment of their own populations. For example, China treats any criticism of its behavior in Tibet or Xinjiang as international meddling. In the official Chinese view, human rights are well and good, but they should not lead to external critique of matters within China's domestic jurisdiction. As discussed below, the members of ASEAN have also been fairly consistent on their insistence on no external interference into matters reserved for domestic jurisdiction. In short, Asian countries do not seem to be major proponents of global governance that undermines national sovereignty, particularly not in spheres related to human rights. Instead, the emphasis is on sovereign prerogatives and noninterference.

The Asian position makes sense given structural and historical dynamics in the region and reflects suspicion of the motives of Western critics of Asian practices. One can see in this emphasis a post-colonial sensibility.<sup>25</sup> In an environment of decolonization, new states in Asia focused their attention on the prerogatives of state-building. The Asian position was decisively articulated by India, China, and Burma in 1954 under the Five Principles of Peaceful Coexistence:<sup>26</sup> (1) mutual respect for territorial integrity and sovereignty; (2) mutual non-

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<sup>24</sup> See Sienho Yee, *The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems in the Protection of Human Rights: The European and Asian Models as Illustrations*, 8 SING. Y.B. INT'L L. 157, 162-63 (2004).

<sup>25</sup> Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia* (Aug. 2, 2009) (unpublished paper, presented at Asian Society of International Law Meeting, Tokyo), available at <http://www.asiansil-tokyo2009.com/pdf/A-3/DIANE%20A.%20DESIERTO.pdf>.

<sup>26</sup> Zhou Gang, Former Chinese Ambassador to India, *The Establishment of the Five Principles of Peaceful Coexistence and its Historical Contributions*, Chinese People's Inst. of Foreign Affairs, Foreign Affairs J., No. 72 (2005).

aggression; (3) mutual noninterference in internal affairs; (4) equality and mutual benefit; and (5) peaceful coexistence.<sup>27</sup> These principles were reiterated at the Bandung Summit on Afro-Asian Solidarity in 1955, an important forerunner of the Non-Aligned Movement.<sup>28</sup> In turn, these principles provided inspiration for the founding documents of the regional communities in South and Southeast Asia. But the principles are essentially Westphalian in character. In short, just as the Western powers turned toward global institutions and integration, nascent Asian countries and powers were asserting their sovereignty and the importance of noninterference in domestic matters.

### *C. Regionalism?*

What about the regional option? Many commentators have predicted that the world will become one of regional blocs, embodied in organizations.<sup>29</sup> If Asian countries emphasize national sovereignty over universalist principles, perhaps they would prefer closer regional cooperation. But regionalism, too, is most developed in Europe, where the European Convention of Human Rights and the EU have created a quasi-federalist constitutional order. The evidence is that Europe is actually the exception, not the vanguard, in the new world order. Regionalism nowhere else shows signs of being as vigorous, especially in the human rights field. The Inter-American Human Rights system has made important contributions to international jurisprudence, but it is woefully underfunded.<sup>30</sup> Indeed, it would probably collapse without funding from the

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<sup>27</sup> ANAND, *supra* note 6, at 101.

<sup>28</sup> XV Summit of Heads of State and Government of the Non-Aligned Movement, History and Evolution, <http://www.namegypt.org/en/AboutName/HistoryAndEvolution/Pages/default.aspx> (last visited Sept. 3, 2009).

<sup>29</sup> JEFFREY A. FRANKEL, REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM (1997); Wieslaw Michalak & Richard Gibb, *Trading Blocs and Multilateralism in the World Economy*, 87 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS No. 2 264 (1997).

<sup>30</sup> See Inter-American Commission on Human Rights [Inter-Am. C.H.R.], *Annual Report*, at ch. 2(I), Inter-Am C.H.R., OEA/Ser.L/V/II.134, doc 5. Rev. 1 (Feb. 25, 2009), available at <http://www.cidh.oas.org/annualrep/2008eng/Chap2.a.eng.htm#Reorganization>; Paolo Carozza, President, Inter-Am. C.H.R., Remarks at the Inaugural Session of the 133rd Regular Period of Session of the IACHR (Oct. 20, 2008), available at <http://www.cidh.oas.org/Discursos/10.20.08.eng.htm>.

EU. The various regional trade blocs in Latin America are deepening, but they are also fragmenting.<sup>31</sup> African regionalism is nascent and, to this point, is more formal than substantive.

Now consider Asia. East Asia is the home of the paradigmatic nation-states: Japan, Korea, China, and Vietnam. These nations have histories far older than the relatively recent emergence of nation-states in Europe. There is no history of a *jus commune* or a Holy Roman Empire to inform a regional vision for the future.<sup>32</sup>

Asian regionalism remains in its infancy.<sup>33</sup> Two decades after the formation of the Asia-Pacific Economic Cooperation (APEC) forum, the group remains largely a talking shop. It holds an annual summit that is a must-attend event on the global diplomatic scene. But its governance structure is minimal. Perhaps its most visible achievements are cross-border coordination on terrorism and shipping security, issues that serve important state interests and are hardly a harbinger of deep integration.

The leading regional association is ASEAN. Since its founding in 1967, ASEAN has expanded to ten members and developed programs of regional integration, embodied in the 2007 adoption of the ASEAN Charter.<sup>34</sup> ASEAN's program now includes a free-trade association (FTA), though integration is not deep given that the region's economies are largely competitive rather than complementary. ASEAN's FTA has no regional court, notwithstanding proposals to

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<sup>31</sup> See *Final Declaration from the First Cuba-Venezuela Meeting for the Application of the ALBA*, VENEZUELANALYSIS, Apr. 30, 2005, <http://www.venezuelanalysis.com/analysis/1097> (describing the results of a diplomatic meeting on strengthening economic ties under the "Agreement for a Bolivarian Alternative for the Americas (ALBA)").

<sup>32</sup> R. C. VAN CAENEGAM, *EUROPEAN LAW IN THE PAST AND FUTURE: UNITY AND DIVERSITY OVER TWO MILLENIA* (2002); REINHARD ZIMMERMAN, *ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY* (2001).

<sup>33</sup> See Yee, *supra* note 24, at 163-64.

<sup>34</sup> See Association of Southeast Asian Nations [ASEAN], *ASEAN Charter* (Nov. 20, 2007), available at <http://www.aseansec.org/ASEAN-Charter.pdf>. The Charter was ratified by all ten members and came into force by October of 2008. ASEAN, *Press Release: ASEAN Embarks on New Era – Charter Fully Ratified* (Oct. 21, 2008), available at <http://www.aseansec.org/22022.htm>.

set one up, and has made its most significant achievements in tariff reductions. But these accomplishments are hardly the stuff of deep integration, and they reflect the natural interest of states in cross-border coordination rather than an erosion of sovereignty. The ASEAN Regional Forum is the most developed security structure in the region, and it does provide an important place to air issues and hold discussions. But it is hardly institutionalized in the sense of having any *independent* affect on political and security outcomes. In any case, a forum for discussion by national leaders is emblematic of Westphalian, not universalist or constitutionalist, thinking.

ASEAN is associated not with sovereignty-reducing integration but with the “ASEAN Way”: a process of consultation and consensus that is identified with many of the cultures in the region. Its Charter emphasizes the traditional principles of noninterference, sovereignty, and independence.<sup>35</sup> To be sure, the Charter calls for ASEAN’s purposes to include strengthening democracy and protecting human rights<sup>36</sup> and calls for a human rights body.<sup>37</sup> The Intergovernmental Commission on Human Rights was established as this article went to press, but remains controversial.<sup>38</sup>

Perhaps the greatest achievement of Asian regionalism has been the ASEAN+3 system of financial cooperation known as the Chiang Mai Initiative. ASEAN+3 refers to ASEAN’s regular meetings, institutionalized since 1999, with Japan, China, and South Korea.<sup>39</sup> The Chiang Mai Initiative is a series of bilateral swap arrangements through which countries promise to provide

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<sup>35</sup> *ASEAN Charter*, *supra* note 33, at ch. I, art. 2.2(a), (e).

<sup>36</sup> *Id.*, ch. I, art. 2.2(i).

<sup>37</sup> *Id.*, ch. I, art. 14.

<sup>38</sup> Simon Roughneen, *ASEAN Human Rights Body Launched Amid Controversy*, The Irawaddy, available at [http://www.irawaddy.org/article.php?art\\_id=17051](http://www.irawaddy.org/article.php?art_id=17051)

<sup>39</sup> See Richard Stubbs, *ASEAN Plus Three: Emerging East Asian Regionalism?*, 42 ASIAN SURV. 440, 455 (2002) (arguing that ASEAN+3 has considerable promise as it moves forward on multiple issues). *But see* Markus Hund, *ASEAN Plus Three: Towards a New Age of Pan-East Asian Regionalism? A Skeptic’s Appraisal*, 16 PAC. REV. 383, 406-07 (2003) (acknowledging the achievements of ASEAN+3 in financial cooperation, but arguing that the initiative is running out of steam).

each other with currency to address short-term liquidity problems. The Initiative is now being multi-lateralized and might one day form a regional monetary fund.<sup>40</sup> However, countries have not always utilized it even when opportunities arose, and it remains unclear if it will foreshadow further integration.<sup>41</sup>

Why is regionalism so apparently underdeveloped in Asia? ASEAN has played the lead largely because the two large powers that would be natural leaders of Asian regional integration are unable or unwilling to play the role. China's grand strategy—articulated by Deng Xiaoping as *taoguang yanghui* (“hide capacities and bide time”)—has been to let other powers take the lead. China is growing more assertive in international and regional fora but is still not ready to create an alternative Beijing-centered dialogue for Asia, as its internal transition to a market economy is incomplete and will remain so for some time.

Japan has been unable to play the role of host and leader for a variety of reasons, including the power of domestic interest groups, its relationship with the United States, and lingering tensions with China and other Asian countries over its behavior before and during World War.<sup>42</sup> Of course, Germany faced similar historical constraints in Europe, and it effectively formed a partnership with the French to drive European integration. What are the prospects for Japan and China jointly leading greater integration? Japanese, Chinese and Korean leaders have recently met to discuss an East Asian Community, which would not include the United States. But there seem to be structural limits to this cooperation, and most observers view Japan and China as rivals as much as they are partners.<sup>43</sup>

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<sup>40</sup> Hyong-kyu Chey, *The Changing Political Dynamics of East Asian Financial Cooperation: The Chiang Mai Initiative*, 49 ASIAN SURV. 450, 451-52 (2009).

<sup>41</sup> Hal Hill, *Political Realignment in Southeast Asia*, 172 FAR E. ECON. REV. 8, 13 (2009).

<sup>42</sup> Chey, *supra* note 38, at 453-54.

<sup>43</sup> But see Men Honghua, *East Asian Order Formation and Sino-Japanese Relations*, 17 IND. J. GLOBAL LEGAL STUD. XXX (2010) (exploring possibilities for China and Japan to cooperate more intensively on regional integration).

The EU's formation grew from a grand bargain between France and Germany. In the 1950s, Germany was the rising economic engine of Europe, but it was unable to take the political lead for obvious reasons. France desired political leadership and sought to bind Germany into a common economic project to avoid a repeat of the First and Second World Wars. These two pillars formed the European Coal and Steel Community along with Italy and the smaller Benelux countries. From these early seeds, the EU developed into the quasi-federalist superstate that it is today, often spurred on by the influential European Court of Justice.

Such a dynamic is, at present, unthinkable in Asia. In Asia, the rising power is China, and the status quo power is Japan. The two powers have utterly different political and social systems. Neither needs a regional organization to promote bilateral economic integration, which is developing apace. China might one day show German-style inclination to hide its leadership behind a regional façade,<sup>44</sup> but, at this point, the political merits of an sovereignty-eroding regional arrangement are not obvious from the point of view of either China or Japan.

European integration had a security logic as well as an economic one. Having fought numerous wars, and facing an existential threat from the Soviet Union, the EU complemented the North Atlantic Treaty Organization (NATO). Asia faces no common threat from outside the region that might serve to incentivize integration. The largest offshore power is the United States, hardly a security threat that might mobilize a common bond between China and Japan.

ASEAN's regionalism is a harbinger of Asian regionalism to come. Above all, it is *sovereignty reinforcing*. The vaunted policy of noninterference has guided ASEAN from its earliest days, and led to its failure to condemn the Khmer Rouge and the Burmese generals. There is not, and will not in the future be, a supranational court designed to adjudicate disputes

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<sup>44</sup> Injoo Sohn, *Learning to Co-Operate: China's Multilateral Approach to Asian Financial Co-Operation*, 194 CHINA Q. 309 (2008).



among Asian neighbors. In other words, Asia has a Westphalian style of regionalism, in which the princes gather to discuss mutual concerns but refrain from criticizing each other, least of all over “internal” affairs. There is plenty of “New World Order” cooperation among ASEAN bureaucrats, but this reality is perfectly compatible with classical international law and a Westphalian view.

Sovereignty-reinforcing regionalism served the interests of state-building in an era when every Southeast Asian nation faced internal challenges to its sovereignty, in places such as Mindanao, Karen State, Aceh, and Songkhla. Each of the Southeast Asian states was multiethnic in theory, while having a dominant majority in practice. The legacy of colonial borders meant that some populations were internally disaffected and sought some degree of autonomy or secession. The ASEAN doctrine of noninterference meant that states refrained from funding national liberation movements in their neighbors, and this restraint was helpful during the phase of state-building. It is possible that, as Asian states become more mature and secure within their internal structures, their political outlooks will change to be more interventionist. Perhaps a more secure and democratic ASEAN would be more interested in critiquing Myanmar. But the signs are not strong. The policy of constructive engagement with Myanmar has corresponded with a *decrease* in leverage, as China has consolidated its position as the main supporter of the military regime.<sup>45</sup>

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<sup>45</sup> See Joint Statement of the Meeting of Heads of State/Government of the Member States of ASEAN and the President of the People's Republic of China, <http://www.aseansec.org/5476.htm> (reaffirming China's respect for each country's independence and their adherence to the principle of noninterference); see also Sudha Ramachandran, *Yangon Still Under Beijing's Thumb*, ASIA TIMES ONLINE, Feb. 11, 2005, available at [http://www.atimes.com/atimes/Southeast\\_Asia/GB11Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/GB11Ae01.html) (detailing China's strategic support for Burma's military regime).

#### *D. Chinese Hegemony*

Will Asian attitudes change with the continued ascent of China? Clues to this development can be found in China's foreign policy over the last fifty years. China's consistent position has been one of sovereignty, mutual noninterference, and refraining from criticizing other countries for their internal behavior.<sup>46</sup> As with Southeast Asia, China's position was rooted in the imperatives of state-building, as well as a desire to reunify the nation after the legacies of colonialism and civil war.

Even if China rose to hegemonic status on the international scene, it does not seem likely that it would emerge as an internationalist bastion. One clue might be the traditional Chinese international order, in which China was seen as the center of the world, with other states serving as vassals and tributaries. The Chinese emperor was the Son of Heaven, supreme among earthly rulers. The tribute system was one in which states around China were not taken over but rather were expected to send tribute to acknowledge the suzerainty of China. In exchange, the countries received trade privileges and some promises of protection and mediation, as well as the status of civilized peoples. The system is of ancient origin, but it was formalized by the Ming and Qing dynasties in the second millennium C.E. and characterized by elaborate rituals. At various times, the system incorporated Japan, Korea, Vietnam, the island Kingdom of the Ryukyus, and various states in Southeast and Central Asia.

Notably, the tributary system was not based in some universal ideology to be imposed on other states. Rather, it was based in a notion of cultural and civilizational superiority.<sup>47</sup> Other states might be barbarian, or might demonstrate civilizational qualities by acknowledging the

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<sup>46</sup> See Rone Tempest, *China Changes Its Role in Recurring Scene*, L. A. TIMES, Feb. 28 1998, at A1, available at <http://articles.latimes.com/1998/feb/28/news/mn-23871>.

<sup>47</sup> John K. Fairbank, *Tributary Trade and China's Relations with the West*, 1 FAR E. Q. 129, 129 (1942); Zhaojie Li, *Traditional Chinese World Order*, 1 CHINESE J. INT'L L. 20, 48 (2002).

superiority of China, but there was no universalist tradition or belief system to which all had to convert. This approach contrasts with the international orders promoted by Islamic and Western civilizations, which both contained strong universalist overtones born of religious or ideological motives. The modern human rights movement has obvious continuities with Western universalism; China's long-standing approach to world affairs has been characterized as realist, in which power politics matter more than promoting any ideology.

Interestingly, the tributary system was characterized by its bilateral character. It was not a regional council of states, with China at the head, but rather it was a hub and spokes system with China at the center.<sup>48</sup> It emphasized non-intervention in the affairs of the barbarians, as well as non-exploitation of them. This dynamic does not augur well for an integrated China-centered Asian Union. China's current approach to international affairs has deep historical and ideological roots, and the presumption must be that these will persevere.

A China-centered world, should it emerge, might be a more peaceful one than the Europe-dominated world of the past few centuries. A large power *without* a universalist ideology may be less prone to outbursts like those of the United States in the past two decades, in which notions of humanitarian intervention and regime change have led to greater militarism. If international conflict is reduced, however, domestic conflict might increase, and the supposed trend toward greater protection of the individual will come to a halt. Surely, China's treatment of North Korea and Myanmar, the two worst human rights offenders in Asia by far, as well as its support for the regime of Omar Al-Bashir in Sudan, are harbingers.

Any exercise in prognostication is dangerous, and extrapolating from current trends, much less ancient patterns, is always tricky. The relations between China and Japan, the two great powers of the region, will be a crucial determinant, and these relations could take a variety

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<sup>48</sup> Li, *supra* note 45, at 49.

of directions. There are countervailing trends, in particular the efforts to conceptualize an East Asian Community.<sup>49</sup> But the analysis provided above seems no less unwise than looking at Asia through the lens of Europe.

## II. SHOULD AUNG SAN SUU KYI WORRY? WHY EASTPHALIA IS NOT INEVITABLE

Asian states have stood for application of relatively conservative principles to guide international order, principles oddly reminiscent of Westphalia. If this approach represents an enduring set of commitments, an Asia-centric world would likely emphasize a return to classical principles of state sovereignty and noninterference at the expense of human rights and universalism. Such a world might even have less inter-state conflict. How likely is this world to emerge? In other words, should Aung San Suu Kyi be worried? The short answer is “not really.”

There are two possible obstacles to the vision of Eastphalia as Westphalia articulated above. First, Asian countries may not, in fact, become the major power bloc in the world, as the conventional wisdom holds. The Asian century may turn out to be the multipolar century. In keeping with the tenets of noninterference, powerful Asian states would not necessarily undermine existing institutions, particularly those outside Asia. Second, Asian preferences may converge with Western ones as Asia develops economically. This possibility might lead Asians to support the universalist visions that developed in the West. I consider each possibility in turn.

Consider the first issue. Is it so clear that Asia will be the primary force in world affairs? Most observers assume that an Asia-centered world order will be a China-dominated one. But China, in particular, faces daunting political, social, and environmental obstacles that might impede its ability to provide effective regional or global leadership. The projections of a China-dominated world may be subject to the same fate as the prognostications of the last century,

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<sup>49</sup> See, e.g., EAST ASIAN REGIONALISM FROM A LEGAL PERSPECTIVE (Tamio Nakamura ed., 2009) (examining the features of regionalism from a comparative perspective and proposing a framework for an East Asian Community including a Charter and the fundamental principles for regional cooperation in East Asia).

when various analysts predicted that Sri Lanka would be a major developing country; that Japan would dominate the twenty-first century; that the Southeast Asian governments were too undisciplined to promote economic growth; and that a world food crisis would occur in the 1970s and 1980s.<sup>50</sup>

These doubts about the likelihood of Chinese hegemony may be particularly salient given the presence of other large powers in Asia, such as Japan and India, and the ASEAN collectivity. Some of these powers and countries have chosen to become closer to China, perhaps as a hedge against U.S. dominance.<sup>51</sup> But it is not clear this trend would continue if China sought to exert active dominance, given ancient distrust of Chinese hegemony in countries such as Korea and Vietnam.

Even if China dominates Asia, many other competing forces in the world might undermine the revival of Westphalian principles in Eastphalia. The Middle East has a different tradition, that of a transnational Arab nation or Muslim *umma*, superior to the temporal borders of nation-states. Europe will retain its universalist traditions. Indeed, from a conservative Eastphalian perspective of a large dictatorship like China, the retention of robust regional human rights institutions in Europe might be desirable precisely because they could ameliorate pressures to make the global system stronger. The sovereigntist model, meanwhile, might appeal to states in Africa and the Middle East who are concerned about external cultural and political influence. Eastphalia would, thus, involve continued regional diversity, helping prevent any shift in the direction of sovereignty-impinging global constitutionalism.

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<sup>50</sup> Saman Kelegama, *Development in Independent Sri Lanka: What Went Wrong?*, 35 ECON. & POL. WKLY. 1477, 1477 (2000); *see generally* PAUL EHRLICH, THE POPULATION BOMB 44 (1968); GUNNAR MYRDAL, ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS 376-409 (1968) (discussing the impact of Southeast Asian political systems on the development of the region); CLYDE V. PRESTOWITZ, TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD (1988); VOGEL, *supra* note 1 (discussing Japan's rise to preeminence).

<sup>51</sup> DAVID C. KANG, CHINA RISING: PEACE, POWER, AND ORDER IN EAST ASIA 54-55 (2007).

Second, and perhaps more likely, Asian countries could change their preferences as they develop economically. As countries get richer, their citizens tend to demand more democratic governance and human rights.<sup>52</sup> The experiences of the so-called Asian Tigers provide some evidence in this regard. Taiwan, Korea, and Indonesia all democratized after extended periods of economic growth under an authoritarian regime. South Korea now has a vigorous human rights commission, and the nascent ASEAN Intergovernmental Commission on Human Rights might end up becoming an active body, despite low expectations.<sup>53</sup>

The main question here is whether democratization will accompany the economic rise of China. Randall Peerenboom points out that China is, in comparative terms, still a poor to middle income country, and that the experience of other nations has been that democratization does not occur until a certain level of per capita income is reached. China is still decades away from achieving this level of wealth. Once China reaches this level, Peerenboom expects that similar democratization developments may be possible.<sup>54</sup> In this scenario, Asia may indeed come to look more like Europe because of a genuine consensus for democratic governance triggered by economic development.

This scenario itself emphasizes universal dynamics. The statistical regularity with which countries seek to democratize after achieving a particular level of wealth is, like all such statistical regularities, subject to exceptions. Singapore, one of the world's richest countries and a leader in articulating Asian views in international affairs, is one such exception, being typically categorized as a semi-democracy. Whether Singapore is the exception that proves the rule, or a harbinger of broader trends for the twenty-first century, becomes a central analytic issue.

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<sup>52</sup> RANDALL PEERENBOOM, *CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST?* 39-40, 63-65 (2007).

<sup>53</sup> U.N. News Centre, *New Regional Body Will Help Protect Human Rights in Southeast Asia* (July 22, 2009), available at <http://www.un.org/apps/news/story.asp?NewsID=31547&Cr=human+rights&Cr1>.

<sup>54</sup> PEERENBOOM, *supra* note 50, at 124-25.

Some scholars have emphasized Asia's slow but steady shift toward global trends. The current President of the ICJ, Hisashi Owada, has argued that the Asian nations are moving slowly and steadily toward a universal vision of the rule of law in international affairs.<sup>55</sup> Certainly Asia's participation in a variety of global fora, and leadership in certain international institutions, might suggest greater globalism. This globalist turn might in time affect the attitudes of Asian populations, which would then demand further internationalization by their leaders.

Some visions of the international order emphasize how small steps can lead, and indeed *do* lead, toward greater cooperation. Early scholars of the EU, such as Ernst Haas, focused on how cooperation in relatively uncontroversial areas led to "spillovers" that encouraged further and further integration over time.<sup>56</sup> States create institutions that then change the preferences of the member states. In some approaches, this pattern follows a logic of path-dependency, so that the costs of further integration decline with each shift toward cooperation. This paradigm would predict greater institutionalization of ASEAN, and perhaps even a broader regional organization in the future. Whether one buys this teleological vision, it is at least a theoretical possibility that would undermine the vision of Eastphalia described above.

Another vision drawn from the human rights literature emphasizes the acculturation of states to norms associated with institutions. Institutions provide fora in which state elites can be persuaded of the merits of alternative approaches.<sup>57</sup> Elites can also become "acculturated" to the importance of human rights, leading to internalization at the state level.<sup>58</sup> Either of these paradigms suggests that Eastphalia would look different from Westphalia and more similar to the

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<sup>55</sup> Hisashi Owada, *The Rule of Law in a Globalizing World: An Asian Perspective*, 8 WASH. U. GLOBAL STUD. L. REV. 187, 200-02 (2009).

<sup>56</sup> ERNST B. HAAS, BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION 456-57 (1964).

<sup>57</sup> RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (forthcoming 2010).

<sup>58</sup> *Id.* See also Harold Hongju Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975, 977 (2005).

universalist vision associated with global constitutionalism. The key factor here involves the shift in preferences among populations and their leaders toward a global convergence.

In short, Eastphalia is hardly inevitable. Obstacles remain with regard to the continued trajectory of China, and, although in any projection Asia will remain a very important region, it is likely to be one among many, and unlikely as a matter of both inclination and power to project its classical Westphalian vision onto other players in the international scene.<sup>59</sup> Even if East Asia emerges as the single dominant region of the world, a convergence in preferences may also occur such that Eastphalia reflects current European trends toward global constitutionalism.

#### CONCLUSION

The world is a complex and unpredictable place, and predictions should be made with caution. Prognosticators of the international scene have focused on two claims on which there is broad agreement: First, globalization is producing deep integration among nations that will be accompanied by quasi-constitutional global governance; and, second, Asia will significantly influence the world in decades to come. These two claims are in tension with each other. Asian countries have hardly been leaders in deep integration of the constitutionalist variety, though they have been effective participants in globalized markets. Projecting forward, one expects an Asia-dominated world to emphasize traditional concerns of sovereignty, non-interference, and mutual cooperation rather than the constitutionalist vision of supranational institutions reaching deep into the way states govern themselves and treat their own populations. Eastphalia may be Westphalia without the universalism—a kinder, gentler Westphalia. In this vision, the claim of

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<sup>59</sup> To be sure, it may be less a matter of projection than competition. The US and the Europeans will have to compete with growing Asian influence, power, and preferences in some places, such as the Middle East and Africa, wherein the sovereigntist vision is likely to be more attractive than the Western one.



Asian dominance turns out to be correct, while the claim of global constitutionalism proves to be wrong.

Things could turn out differently. Perhaps Asia will *not* be the center of the 21<sup>st</sup> century world. Certainly, plenty of potential obstacles might change current economic trends, and the record of prognostication about the region has hardly been stellar, as Vogel's quaint title *Japan as Number One* highlights. In this vision, then, global constitutionalism *may* come to pass, and the Treaty of Westphalia may indeed be replaced by the Treaty of Rome on a global scale.

Finally, both claims, that of global constitutionalization and that of Asian dominance, may be compatible. This possibility would require an acceleration of integration in Asia itself and the adoption of a set of norms and preferences among peoples of the region that is compatible with the constitutionalist vision. It is a vision of convergence, in which Asian values become European values and vice versa. It is a vision that Aung San Suu Kyi could live with, as could many of us.